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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/568,307

09/12/2006

Denis Pasquet

1107-060442

3388

28289 7590 07/25/2008

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EXAMINER

YANG, ANDREW

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

07/25/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/568,307	Applicant(s) PASQUET ET AL.	
	Examiner ANDREW YANG	Art Unit 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 April 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 15-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 15-30 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|----------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4/9/2008</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

This office action is in response to Applicant's amendment filed on April 9, 2008.

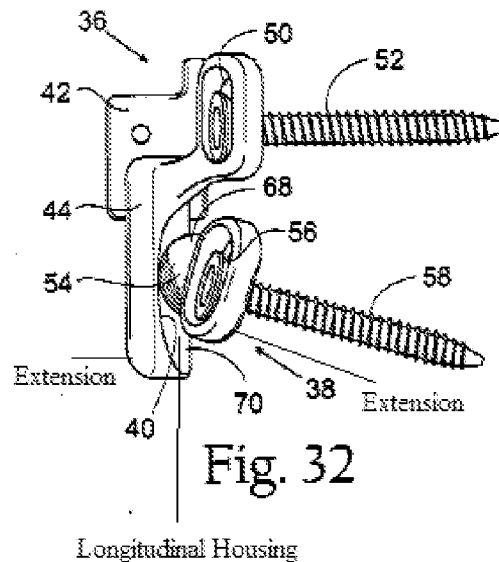
Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

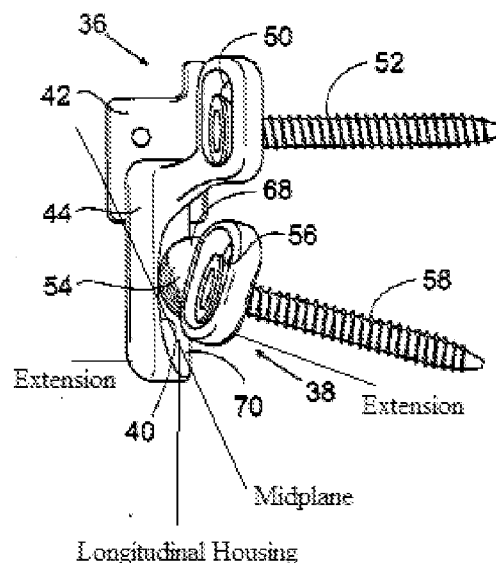
Claims 15-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reiley et al. (U.S. Publication No. 2003/0028250) in view of Zucherman et al. (U.S. Patent No. 5836948).

Reiley et al. discloses an intervertebral implant comprising a spacer having a body with a top end face 36 and a lower end face 38 opposite the top end face. The top end face 36 has a groove 42 wherein the groove comprises a first side and a second side. The first and second sides of the groove each have an opening (Figure 20). The lower end face 38 has a longitudinal housing extending orthogonally to the groove 42 and formed on a bottom end face of lower part 38 as seen in the figure below.



The body of the spacer has first and second opposite side faces with an extension on each of the side faces defining a setback as seen in the figure above. Furthermore, the extension on the left side can also be considered a tab having a width narrower than the width of the implant. The tab faces the extension on the right such that the inside face and the tab cooperate to define the outline of the housing. A section of the housing is U-shaped and has a midplane not orthogonal to the midplane defined by the groove 44. The inside surface of the tab can be convex (Paragraph 124). A hole 56 in the extension is considered a notch facing the tab. The implant has first and second fastening means 52, 58. The implant can be implanted between the fifth lumbar vertebra and the sacral vertebra (Paragraph 20) where in a top portion will be in the longitudinal housing (Figure 38). It is noted that the illustrated figure does not show the sacral vertebrae, however, a top portion of the lower vertebrae in figure 38 is in the longitudinal housing.

Furthermore, a midplane of the housing that is inclined relative to the bottom of the groove. The midplane is also considered a zone. Furthermore, the extension shares the same midplane as the housing, there for it is also inclined relative to the plane formed by the bottom of the groove as seen in the figure below.



Reiley et al. fails to disclose the range of angles that the midplane is inclined. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Reiley et al. with the midplane inclined relative to the plane defined by the bottom of the groove with the claimed range of angles, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233.

Reiley et al. also fails to disclose that a strap having a first end passed into the first opening and a second end passed into the second opening. Zucherman et al.

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teaches an interspinous implant 20 having a groove 26 for receiving a spinous process that has a tether 31 passed into openings on the side faces of the groove 26 (Figure 2). The tether 31 can pierce the process or go around it. It would have been obvious to one skilled in the art at the time the invention was made to construct the device of Reiley et al. with a strap connected at the holes on the side of the grooves for attachment to a spinous process in view of Zucherman et al. Substituting one known means of attachment of a spinous process for another, would have been obvious to one skilled in the art.

Response to Arguments

In response to Applicants argument that Reiley et al. fails to disclose a longitudinal housing that is concave and extends orthogonal to the groove, the Examiner respectfully disagrees. As shown in the figures provided above, component 38 and 44 form a housing there between and the portion 44 is concave on its inner face. Furthermore, with regard to receiving and rest directly on a top portion of the convex sacral vertebra, it has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. Ex parte Masham, 2 USPQ2d 1647 (1987). However, in Paragraph 20 of the disclosure of Reiley et al. it states that the device can be used at all spinal levels, and it can be construed from Figures 36-38, that the lower portion of the device if implanted in the sacral region of the vertebrae, would rest directly on a top portion of the convex sacral

vertebra, while at least a lower portions of the housing as defined by the examiner would receive a portion of the sacral vertebra since it extends longer downward than member 38. The longitudinal housing as defined by the Examiner extends generally in a vertical direction, and the groove extends generally in a horizontal direction, and thus they are orthogonal to each other.

Applicant's arguments with respect to Reiley et al. in view of Taylor have been considered but are moot in view of the new ground(s) of rejection.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. U.S. Publication No. 2003/0040746.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

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the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREW YANG whose telephone number is (571)272-3472. The examiner can normally be reached on IFP.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on 571-272-4719. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Andrew Yang/
Examiner, Art Unit 3733
7/8/2008

/Eduardo C. Robert/

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Supervisory Patent Examiner, Art Unit 3733